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DISPUTE RESOLUTION IN CHINA

Justice Robert F. Utter*

It gives me great pleasure to submit this essay as part of a tribute to Professor Luvern Rieke. I first met him in his initial year of teaching contracts at the University of Washington, when I was a beginning law student. We later worked together in a variety of contexts including ecumenical religious projects; matters concerning domestic relations subjects when I served on the King County Superior Court bench; and on the Judicial Council, where I served as a member of the Washington State Supreme Court. To each role he brought a unique combination of personal qualities: he was thoughtful, courteous, concerned, and actively involved in making law the servant of the people rather than the master.

In recent years, I have been privileged to lead two comparative law study groups to the People's Republic of China (People's Republic) as part of the People to People program.¹ Although my knowledge of China's legal and judicial systems is superficial at best, its long history of using dispute resolution mechanisms, rather than the courts, offers a fresh and interesting perspective. Despite cultural, political, and historical differences, Chinese methods and philosophies of alternate dispute resolution have lessons for those seeking improvement in our traditional Western adjudicative model. Professor Rieke's lifelong interest in finding more appropriate methods for our society to resolve its problems makes this short paper an appropriate subject for a tribute to him.

I. THE TRADITIONAL CHINESE VIEW OF LITIGATION

An old proverb expresses the ancient Chinese view of lawsuits: "It is better to die of starvation than to become a thief; it is better to be vexed to death than to bring a lawsuit."² The traditional preference for dispute

*Washington State Supreme Court Justice. I wish to thank my law clerk, Reiko Cushman, for her assistance on this paper. She is a recent graduate of the University of Washington Law School and a former student of Professor Rieke who shares my respect for him. Reiko taught classes in comparative history as a graduate student at the University of Hawaii at Manoa, where she obtained valuable insights into the cross-cultural enrichment possible between Asian and American cultures.

1. The People to People program is an organization founded by President Dwight D. Eisenhower in 1956. The goal of its Citizen Ambassador Program is to engender friendship between citizens of the United States and foreign countries through personal contacts. One means of accomplishing this aim is to set up tours to bring together counterparts in the same professions: lawyers, physicians, farmers, and the like. CITIZEN AMBASSADOR PROGRAM, PEOPLE TO PEOPLE INT'L (copy on file with the *Washington Law Review*).

2. Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CALIF. L. REV. 1201, 1201 (1966).

resolution outside a legal court structure continues in modern China. An elderly Chinese mediator I met in Beijing in 1986 said he favored mediation because "it is better to keep a friend, than to win a victory." This traditional tendency to avoid litigation has at least three sources: Confucian philosophy, the unavailability and inadequacy of relief in court, and a mutual security system that emphasized a societal structure consisting of small units.

For most of the more than two thousand years before the revolution in 1911, the Chinese legal system reflected societal mores established by the Confucian philosophy which permeated all facets of life.³ Confucianism postulated the existence of a harmony extending throughout heaven and earth. Earthly harmony manifested itself in a hierarchical order, beginning with the emperor and extending downward to the lowest level of society. The aim of government, and indeed of all human relations, was to preserve natural harmony, which was the source of, and was expressed in, ethical behavior. Primary ethical rules lay in the *li*, a variety of moral and customary principles for ceremonial or polite behavior.⁴ Confucianism became a firmly established state policy in China, with the exception of the short-lived and harsh Ch'in dynasty of 221–206 B.C., when the "Legalist" school of thought prevailed.⁵ This Legalist school developed the concept of *fa*, which corresponds more closely to Western notions of law.⁶

Chinese legal history from the Ch'in to the Ch'ang dynasty, overthrown in 1911, reveals an intermingling of Confucian and Legalist strands of thought.⁷ Since *li* provided an insufficient basis to rule the empire, the Chinese used *fa* to reinforce it. By combining *li* and *fa*, concepts of Confucianism were woven into substantive laws. For example, during this period of history the Chinese differentiated criminal penalties according to status—membership in privileged groups like the literati—and position within the family.⁸ This intermingling of the dominant Confucian view of morality with substantive law produced a uniquely Chinese view of disputes and how they should be resolved.⁹

Historically, Chinese jurisprudence placed greater value on compromise than did its Western counterpart. A most-celebrated and subtle legal art was

3. Mitchell, *Dispute Settlement in China*, 4 STUDENT INT'L L. SOC'Y INT'L L.J. 71, 71–72 (1980).

4. Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China*, 55 CALIF. L. REV. 1284, 1290 (1967).

5. *Id.*

6. Note, *Commercial Dispute Resolution Between the United States and the People's Republic of China: Problems and Prospects*, 7 SUFFOLK TRANSNAT'L L.J. 329, 336 (1983).

7. Lubman, *supra* note 4, at 1290–91.

8. A. CLAYRE, *THE HEART OF THE DRAGON* 180–83 (1985).

9. See Schwartz, *On Attitudes Toward Law in China* in GOVERNMENT UNDER LAW AND THE INDIVIDUAL 27–39 (M. Katz ed. 1957).

that of *jang*, which translates as “yielding,” or giving way on certain points in order to garner the advantage on others, thereby fostering a compromise between the parties.¹⁰ Use of *jang* diminished the stature of those who would invoke their “rights” on a unilateral basis so as to aggrandize their position at the expense of another. Moreover, customary ethical rules of behavior, which emphasized status and the necessity of maintaining group harmony, greatly inhibited the assertion of rights.¹¹ Consequently, the Chinese regarded rights-based claims as disruptive violations of fundamental ethical rules.

Although Confucianism stressed the virtue of yielding and compromise so as to avoid friction, it did not prevent the rulers of China from establishing a court system. The courts of traditional China, however, served not only as judicial centers of dispute settlement, but also as the local outposts of the civil service administration. The county magistrate in his *yamen*, or court, supervised the gamut of civil services.¹² Although they were experts in the classics, magistrates received no training in administration. Instead, a magistrate acquired a considerable number of assistants who performed the actual administrative duties. These assistants developed a legendary, and frequently well-deserved, reputation for greed, corruption, and insolence.¹³ At virtually every stage of the proceedings, a magistrate’s assistants felt free to extract “customary fees,” payment of which often proved ruinous to the parties and their families. “Win your lawsuit and lose your money” was an aphorism born of common experience.¹⁴ Consequently, involving an enemy in a lawsuit became well recognized as an effective method of gaining revenge.¹⁵

In addition to being inordinately expensive, time-consuming, and unpredictable in outcome, resort to a magistrate often proved a harsh and degrading experience. Litigation constituted a public admission of some personal failing and required the revelation of private problems to unknown third parties. Moreover, those who went to court often suffered humiliation at the hands of members of the magistrate’s staff, who were their social inferiors. Pending trial and during the long period that the case might be on appeal, the court sometimes illegally incarcerated one or more of the

10. Note, *supra* note 6, at 337.

11. See Northrup, *The Mediatonal Approval Theory of Law in American Legal Realism*, 44 VA. L. REV. 347, 349 (1958).

12. Mitchell, *supra* note 3, at 72.

13. Lubman, *supra* note 4, at 1296 & n.41.

14. Cohen, *supra* note 2, at 1214.

15. *Id.*

litigants. No professional advocate was permitted to represent them. Occasionally, in order to elicit evidence, legally prescribed torture was administered in court.¹⁶ Litigation often led to years of embittered relations between disputants and their respective families, with disputes frequently expanding to involve clans, villages, or guilds.¹⁷

Although the corruption and abuses of the judicial system violated the law, the emperors displayed little concern when the courts proved inadequate as mechanisms for resolving disputes. Perhaps the best known expression of the philosophy underlying the imperial attitude toward litigation came in a statement by the K'ang-hsi Emperor (1662–1722):

[L]awsuits would tend to increase to a frightful amount, if people were not afraid of the tribunals, and if they felt confident of always finding in them ready and perfect justice . . . I desire, therefore, that those who have recourse to the tribunals should be treated without any pity, and in such a manner that they shall be disgusted with law, and tremble to appear before a magistrate.¹⁸

Even though the injustice inherent in the system led most people to avoid the courts, the Chinese could avail themselves of less formal, although equally powerful, means of dealing with civil and criminal disputes. Since at least the third century B.C. the Chinese used the *pao-chia* mutual security system, under which localities were divided into small and smaller groups, whose members were responsible for each others' conduct and tax payment.¹⁹ Extended families, clans, guilds, and other groups also performed dispute settlement functions.²⁰ The pressure such groups applied had the force of traditional teaching behind it, and the application of peer pressure ensured compliance. Although specific means of mediation varied, the common goal was the reconciliation of the parties and the restoration of harmony within the group. A familiar basis for settlement required a party who had been found to be in the wrong to make some gracious gesture toward the group. The "guilty" party might host a large feast or a theatrical entertainment for the entire village. In this way, he or she could make amends for disrupting the social fabric and be reintegrated into the group.²¹

This system of informal dispute resolution had inherent advantages for the people, even if individual cases were often handled arbitrarily. Prevailing social values stressed the necessity of avoiding conflict, observing

16. See D. BONAVIA, *THE CHINESE* 156–57 (1982); A. CLAYRE, *supra* note 8, at 184–85; Lubman, *supra* note 4, at 1295–97.

17. Cohen, *supra* note 2, at 1214–15.

18. *Id.* at 1215.

19. Mitchell, *supra* note 3, at 73.

20. Cohen, *supra* note 2, at 1223.

21. Lubman, *supra* note 4, at 1298.

proper rules of behavior, and relying on the social group to resolve differences. Thus, the informal system provided auxiliary support for the dissemination of Confucian standards and values. Extrajudicial mediation also eased the government's work burden and helped avoid friction between magistrates and the people in their jurisdictions. By handling a broad range of disputes, these extrajudicial groups spared the government the necessity of drafting a comprehensive body of legislation. "In a country as large as China, with its variety of local customs, this would have been a formidable task."²²

Thus, as China entered the twentieth century, extrajudicial mediation was the dominant form of dispute resolution. Confucian philosophical tenets, the structure of Chinese society, and the operation of imperial governmental institutions had combined to produce this striking preference for mediated settlement of disputes.

II. MEDIATION DURING THE TRANSITION FROM THE OLD TO THE NEW CHINA

The first half of the twentieth century was a period of immense upheaval in China. Beginning with the overthrow of the Ch'ing dynasty in 1911, China suffered from increasing internal chaos, capped by the struggle between the Nationalist and Communist forces and the battles waged by both of those groups against the Japanese.²³ Although the Nationalists succeeded in establishing a central government in 1928, they had little time or good fortune to build a modern, Western-style government. Their attempt to engraft a complete civil law system onto the roots of the Chinese legal establishment never functioned effectively. "Traditional, informal, extrajudicial mediation remained the characteristic mode of dispute settlement throughout the years of Nationalist rule."²⁴ By contrast, as part of its reordering of Chinese society, the People's Republic restructured the traditional institutions for settling disputes and created some new institutions. In many respects, dispute resolution now bears the heavy imprint of Communist ideology and perspectives.²⁵

Maoism supplies a view of the world and an agenda for changing it. The "cadre" serves the party in implementing policy. Cadres are party members and other persons who hold paid administrative posts in the government hierarchy and in the many quasi-governmental organizations. Mao's

22. Cohen, *supra* note 2, at 1225.

23. Mitchell, *supra* note 3, at 74.

24. Lubman, *supra* note 4, at 1300.

25. See Zhu, *Mediation: The First Line of Defense* (unpublished manuscript presented at the 1985 Annual Meeting of the American Comparative Law Society) (copy on file with the *Washington Law Review*).

fundamental concern with transforming the thought of individuals lies at the heart of strategies aimed at mobilizing the masses. In the Maoist view, political thought is incorrect unless it proceeds from and applies the correct thought. The thought and consciousness of individuals and their social classes must be changed by "resolving their contradictions" through the use of tools of struggle, especially "criticism and self-criticism" and "thought reform."²⁶

Mao's original concern was to mobilize the support of China's masses, especially the poor peasants who made up the overwhelming majority of China's people. During the 1930's and 1940's, Maoist ideology and the Chinese Communist political style evolved in response to the need for a tiny minority of revolutionaries, isolated among hundreds of politically inert peasants, to create a vast party-led revolutionary army.²⁷ Mao began to structure his own system in 1927, at the same time that the Nationalist government was engaged in its attempts at reform. Mao set up a basic judicial system, and from 1931 through 1934 enacted laws governing land use, labor, marriage, and punishment of counter-revolutionaries.²⁸ The Chinese institution known as the "procuracy" also appeared during this time period. Relying on the Soviet model, the Chinese procuracy investigates criminal cases, evaluates the sufficiency of the evidence gathered, and calls for review of improper decisions.²⁹ Many of the early leaders of the procuracy were philosophers, teachers, and men of letters, but virtually none had any training in the law. After the onset of the Civil War in the late 1920's, military officers took leadership positions. When the Communists came to power in 1949, they were extremely sensitive to Western charges that traditional Chinese law was backward. They also had a general feeling that a "modern" legal system would somehow promote the development of Chinese society.³⁰ Thus, the Communists moved quickly to set up a formal legal system of their own. As in most other areas of governmental design, China patterned the new legal system after that of the Soviet Union.³¹

To staff the new legal system, the Communists retained a number of legal specialists who had worked for the Nationalists, primarily because the Communists did not have within their own ranks people with the skills

26. Lubman, *supra* note 4, at 1304-05.

27. *Id.* at 1301.

28. Letter from Jose Trias-Monge, Chief Justice, Commonwealth of Puerto Rico Supreme Court, to Vincent L. MuKusick, Chief Justice, Maine State Supreme Court (June 27, 1983), *reprinted in* JOURNAL OF THE PEOPLE TO PEOPLE APPELLATE JUDGES DELEGATION, May 13-June 3, 1983.

29. See T. HSIA & K. HAUN, *THE RE-EMERGENCE OF THE PROCURATORIAL SYSTEM IN THE PEOPLE'S REPUBLIC OF CHINA* (1978).

30. Li, *Reflections on the Current Drive Toward Greater Legalization in China*, 10 GA. J. INT'L & COMP. L. 221, 224 (1980).

31. *Id.* at 225.

and knowledge to run a complex legal system. These Western-style legal specialists possessed useful legal skills and held posts where such skills were thought necessary.³² They were, however, considered politically unreliable, and to have an “elitist work style” that did not fit well into the “mass line” approach. For these reasons, a number of “new cadres” were brought into legal work after liberation. They received their positions not for legal skill, but due to their ideological purity or political dependability. After liberation, legal work in China was handled by these two distinct groups. The new cadres lacked legal skills and knowledge, but did bring a new approach to the law. They did not automatically assume that China needed a modern legal system, replete with codes requiring specialists.³³ Instead, they argued that the law should be simple, free of technicalities, and easy for anyone to understand. The “new cadres” stressed simplicity, in part to rationalize their own lack of legal expertise. But they also based their views on the underlying principle that law should be broadly based, and not the special province of a group of elite professionals. Law could then become the tool of the masses, rather than a set of rules accessible only to members of the legal profession.³⁴

During the first few years after the Communists took power, the specialists generally held the dominant position. Their efforts helped establish law codification commissions, judicial and police structures, and rules of operation. Law schools again began to operate, and some legal books and periodicals were published. In 1954, the work of the specialists culminated with the enactment of a series of major laws, including the first Chinese Constitution. The new constitution introduced a tripartite governmental design, consisting of the Supreme People’s Court, the Supreme People’s Procuracy, and the State Council, all responsible to the Standing Committee of the National People’s Congress.³⁵

Over a period of twenty years, the Chinese system suffered from a series of major upheavals. In 1957, the “Anti-Rightist Movement” caused the removal of many specialists from their positions, and the policies they advocated were attacked and denounced. This led to the closure of law schools and the termination of plans for further codification. As the reliable and conclusive authority in every case, the party leadership could supplant any given law and the public security bureaus assumed the functions of the courts and the procuracy.³⁶

32. Mitchell, *supra* note 3, at 75–77.

33. Li, *supra* note 30, at 225.

34. *Id.* at 225–26.

35. Mitchell, *supra* note 3, at 76.

36. *Id.* at 76, 77; A. CLAYRE, *supra* note 8, at 186.

On the heels of the Anti-Rightist Movement, China entered the period of attempted rapid increase in industrialization and agricultural production known as the "Great Leap Forward." Lasting from 1958 to 1960, the Great Leap created havoc throughout China. Conditions during this period required the continuation of the strong central control of the party.³⁷ From the abortive Great Leap until the Cultural Revolution, which began in 1966,³⁸ the formal criminal process regained some of its lost stature. Legal study also made cautious progress. When fines or detention were not considered appropriate punishment, "criticism-education"³⁹ was used to enable the wrongdoer to reform himself. These "mass line" techniques soared to prominence during the Cultural Revolution. The "mass line" included administration of justice by "the people," rather than by those specially-trained for such work.⁴⁰ During the rule of the "Gang of Four" (1966-1976), however, the Chinese used violent and often brutal techniques to accomplish a well-known objective of the times: the overthrow of positive law and everyone associated with it, including lawyers, policemen, procurators, and judges.⁴¹

"The period of calm after the Cultural Revolution presented an opportunity for reassessment of the functions served by each of the legal organs."⁴² The 1978 constitution restored the tripartite administration of justice established under the 1954 constitution, all under Party leadership.⁴³ This led to a movement, begun in 1978, to provide China with a strengthened legal system. Lawyers and law schools are again in evidence, as are legal publications.⁴⁴ The legalization drive is linked to the drive for the "Four Modernizations" of science, agriculture, industry, and national defense emphasized by China's current leadership.⁴⁵ Despite these changes

37. During the Great Leap Forward, in order to enhance industrialization and production efforts, China established People's Communes all over the country. Nevertheless, Mao's ultra-left and isolationist economic policies brought the country to the verge of starvation. D. BONAVIA, *supra* note 16, at 107.

38. The Cultural Revolution, led by the "Gang of Four," was a dark era in modern China's history, marked by the intolerant and violent oppression of the intelligentsia. It was a backlash against the failures of the Great Leap Forward, during which Mao "purged" thousands of top administrators, educators, and scientists who were unhappy with the enforced isolation. *See id.* at 142-43.

39. "Criticism-education" is a Maoist technique wherein the individual who has gone astray is required to publicly submit to, and participate in, a critique of his or her "wrong thinking." The avowed purpose of the procedure is to "correct" the individual after temporary alienation. Lubman, *supra* note 4, at 1305 n.80 (citation omitted).

40. *Id.* at 1303.

41. D. BONAVIA, *supra* note 16, at 154.

42. Mitchell, *supra* note 3, at 78.

43. *Id.*

44. Li, *supra* note 30, at 228-29.

45. Mitchell, *supra* note 3, at 78.

and an increasing tendency to take recourse in the courts, the formal legal system still handles a mere fraction of the number of cases which arise.⁴⁶

III. THE ROLE OF ALTERNATE DISPUTE RESOLUTION MECHANISMS IN MODERN CHINESE LEGAL THEORY

Modern Chinese legal theory is based on the Marxist theory of law, which evolves from the application of dialectical materialism to a series of political and legal dualities.⁴⁷ The Chinese Communist Party “conforms to the Leninist notion of a communist party—a disciplined, elite body of professional revolutionaries leading the masses, especially the proletariat, whose dictatorship it is supposed to embody.”⁴⁸ Under Marxist theory, the law serves the function of creating and maintaining a social order that is advantageous to the ruling class of a society.⁴⁹ However, certain areas of human experience and conduct lie beyond the reach of the law. Social control cannot be maintained by means of law alone, but must be supplemented by morality and the policies of the ruling party. By adjusting relations such as love, friendship, family life, and the like, morality affects a broader range of personal relationships. While the courts may apply the laws, mediation, by virtue of its informality and flexibility, provides a more appropriate forum for the exercise of morality.⁵⁰

Unlike law, which relies on the coercive power of the state, morality finds its support in public opinion, custom, tradition, persuasion, and education. The mediation forum derives its sustaining force from the fact that the disputants are members of interlocking networks of social and work organizations which also participate in the dispute resolution process.⁵¹ Despite these differences, Marxist jurists believe that morality, like law, possesses class character.⁵² Different classes have different moral standards. The interests of the proletariat serve as the basis for communist moral standards. At the center of communist morality lies the concept of collectivism. To live up to moral standards, the individual must measure his own interest against the interest of the collectives in which he participates, and against the interests of the state. Mediators can bring party policy into play by politicizing the issues in a dispute so that a larger issue

46. O'Hara, *Dispute Resolution in the Union of Soviet Socialist Republics and the People's Republic of China*, 33 R.I.B.J. 4, 7 (1985).

47. Zhu, *supra* note 25, at 6.

48. Lubman, *supra* note 4, at 1301.

49. Zhu, *supra* note 25, at 7.

50. *Id.* at 10–13.

51. Lubman, *supra* note 4, at 1309–25.

52. Zhu, *supra* note 25, at 12.

of party policy may transcend the disputants' personal grievances. The antagonist's potential or actual interference with some policy provides the mediator with persuasive grounds to urge disputants to take a more moderate stance on an issue.⁵³

The conception of rights and liabilities in the People's Republic differs radically from that held in the West. Chinese jurists criticize the capitalist legal system as one that has trivialized and commercialized matters such as human dignity, conscience, reputation, pain and morality into items of merchandise that have a price and can be exchanged.⁵⁴ In the People's Republic redress for injuries to one's personal rights are naturally channeled into mediation proceedings. However, the People's Republic has not explicitly adopted the mediation practices that existed under preceding regimes. Such an assertion of continuity would conflict with the Party's attempt to discredit both the imperial and the republican systems of law as exploiters of the masses. Instead, the Chinese Communists find their own historical heritage of mediation in their two decades of control over revolutionary bases in remote "liberated areas" of China prior to their assumption of national power in 1949.⁵⁵

Today, mediation in China reflects the application of communist ideology within the intricate institutional network built around each individual's role in modern Chinese society. Small groups inhabit the lowest rung on the ladder of organization in China. Each small group contains about ten to twenty people, organized primarily by place of residence and by place of employment. These groups have regular meetings to discuss their understanding of current events and ideology. To rectify any errors in their thoughts, everyone must speak out. When a particular problem arises, the group will "criticism-educate" the offending member, and will apply social pressure in an attempt to bring the member's behavior into line with group norms.⁵⁶ Membership in these various groups will overlap so that people may be pressured to conform by almost everyone with whom they come into contact. In many of these cases the mediator has overheard or witnessed the incident in question. If any one of the mediators fails in an attempt at mediation, they will call representatives from one or more of the other relevant groups. "The strength of this web of organization lies in its emphasis on cooperation and in group pressure adapted to the particular circumstances of each case."⁵⁷

53. Lubman, *supra* note 4, at 1339-46.

54. Zhu, *supra* note 25, at 4.

55. Cohen, *supra* note 2, at 1205.

56. Mitchell, *supra* note 3, at 79.

57. *Id.* at 80.

In today's China, mediation serves a variety of functions. One function of mediation is, of course, to resolve disputes. In so doing, mediation maintains public order by ending disruptions of the social fabric and ensures the orderly functioning of economic activity. Aimed at ending bad feelings between disputants, mediation offers the individuals involved a highly informal and readily available mode of settling their dispute. Mediation in China, however, also serves other identifiable functions that may overshadow dispute settlement. It serves to articulate and apply the ideological principles, values, and programs of the Chinese Communist Party and helps to mobilize China's people to increase their commitment to party policies and goals.⁵⁸ Rather than settling disputes between individuals, mediation also serves to suppress such disputes, which are regarded as harmful social conflict that interferes with the construction of a strong socialist China.⁵⁹

Undoubtedly, mediation in China has undergone a shift in emphasis. While the traditional mediation system was the product of Confucian ideology and traditional institutions, Chinese mediation today applies communist ideology within the web of relationships surrounding the individual. Since 1978, yet another shift in mediation's political emphasis has occurred.⁶⁰ The current leadership has reassessed China's class relations and the scope of class struggle in the current Chinese society. Today, the most important issue in Chinese politics concerns the realization within this century of the Four Modernizations—science, agriculture, industry, and national defense. With this shift of emphasis, the style of people's mediation work is also undergoing changes. The discouragement of “unprincipled settlement” has abated, as the encouragement of harmony among the populace is a prerequisite for the success of China's Four Modernizations plan.⁶¹ With the dawn of the 1980's, China finally inaugurated a new legal system with six codes covering crime, civil procedures, and elections to government office.⁶²

Despite the continued shift in political emphasis, mediation in China has maintained a certain continuity. The traditional forces underlying the use of mediation continue to exist even in modern China. These forces include the continuing practice of extrajudicial resolution of civil disputes, a deficiency in adequate judicial remedies, and a lack of rules defining the individual's substantive rights in private relationships. Specific features of

58. Lubman, *supra* note 4, at 1339.

59. *Id.* at 1346–49; *see also* Zhu, *supra* note 25.

60. A. CLAYRE, *supra* note 8, at 188–89; O'Hara, *supra* note 46, at 6, 8, 13.

61. Zhu, *supra* note 25, at 17.

62. D. BONAVIA, *supra* note 16, at 152.

mediation have endured massive upheaval throughout China's history. Just as in traditional China, mediation in the People's Republic takes place in the context of a nation with a largely integrated world view. The parties to any given dispute share a large set of values and assumptions that can be appropriately and usefully appealed to in order to put the dispute into a larger perspective, and to allow the parties more readily to modify their positions in order to further their shared vision. For the Chinese, each person's identity is intimately and essentially defined by their many relationships within the intricate network of Chinese society.⁶³ Disputes never affect only the primary parties—that which touches one person must inevitably reverberate through the lives of a host of others. Throughout their history, the Chinese have recognized that one cannot replace some things with money or other material goods. Traditional China practiced in its informal mediation what the “cadres” of the People's Republic have made explicit—the notion that the rules by which people govern their lives should be simple, accessible, and understandable by the people.

Recent developments bear witness to the fact that the People's Republic is a country in a state of constant flux. Predictions for the future are difficult to make. Under Mao, China's legal experience consisted of little formal criminal or civil law. From 1966 to 1971, during the height of the Cultural Revolution, the rule of law—such as it was—ceased to exist, and the military ran the country. For the eleven years of the Cultural Revolution, law was whatever those in power at the time wanted it to be. Yet as we have seen, to some degree mediation in China today presents continuity with past tradition. China's seemingly inherent ability to maintain this continuity leaves one with a belief that whatever faction currently holds power, mediation will play an integral role in China's social structure. A conversation I had with a Beijing official about the breakdown of formal law during the Cultural Revolution provided some insight into the strength and value of China's tradition of mediation. I asked this official how his country of over one billion people managed their personal and commercial disputes during that time. His reply was one word: “tradition.” A tradition that has demonstrated such tremendous resilience and power can surely teach us much.

IV. CONCLUSION

Although the United States proceeds from a very different cultural basis than China in resolving disputes, we share more common factors with China than we would initially suspect. Our court system has as its goal the efficient administration of thoroughgoing justice, rather than a historic and

63. A. CLAYRE, *supra* note 8, at 92–93.

cultural design to inhibit its use. Nonetheless, the reality is that, for many with either commercial or personal disputes, the cost and delay of our traditional system can make its use impractical or impossible.

In the past twenty years, we have experienced a flowering of interest in alternative dispute resolution techniques, which have historical roots in this country. Dispute resolution techniques have traditionally existed in culturally closeknit communities and in many areas of commerce in the United States. "Arbitration has been used to resolve commercial disputes for hundreds of years, and mediation was commonplace in the religious communities in colonial New England."⁶⁴ In the mid-1800's, when the first generation of Chinese immigrants arrived in California, the strong anti-Chinese movement led them to form their own dispute settlement program, modeled after the *pao-chi* system of traditional China.⁶⁵ In 1920, the Jewish Conciliation Board was established in New York City to handle problems specific to the Jewish community.⁶⁶ Recently, the Christian Conciliation Service has been established nationally to respond to disputes between members of the Christian faith, with its services open to others, as well.⁶⁷ The formal judicial systems of many states acknowledge the role alternative forms of dispute resolution have to play in relieving court congestion and in encouraging more harmonious settlement of differences. Washington State, for example, has enacted a mandatory arbitration system for civil actions where the sole relief sought is a money judgment beneath a sum set by statute.⁶⁸

Businesses of all sizes recognize that for many disputes, our current system is wasteful and often counterproductive. *Getting to Yes*, by Roger Fisher and William Ury, is a popular current publication that describes techniques for reaching a solution that optimizes the result for all parties concerned.⁶⁹ The book focuses on the underlying values shared, or at least acknowledged, by the parties to the dispute. The goal is to preserve the relationship, rather than to pursue the absolute victory that we have been accustomed to seek in our system.

64. S. GOLDBERG, E. GREEN & F. SANDER, *DISPUTE RESOLUTION* 1 (1985).

65. VERA INSTITUTE OF JUSTICE, *MEDIATION AND ARBITRATION AS ALTERNATIVES TO PROSECUTION IN FELONY ARREST CASES, AN EVALUATION OF THE BROOKLYN DISPUTE RESOLUTION CENTER (FIRST YEAR)* 1 (1979).

66. *Id.*

67. The Christian Conciliation Service (CCS) is a national organization of Christian attorneys and others, with ministries provided to local churches. "Christian conciliation" is the voluntary submission of a legal dispute to the CCS for mediation and/or arbitration. The process incorporates the laws of the State of Washington and Biblical principles of justice, love, forgiveness, and reconciliation. Rules of Procedure, Christian Conciliation Service of Puget Sound, Rule 2 (copy on file with the *Washington Law Review*).

68. See WASH. REV. CODE ch. 7.06 (1986); WASH. SUP. CT. MANDATORY ARB. R. (1986).

69. R. FISHER & W. URY, *GETTING TO YES* (1981).

While the focus on dispute resolution offers hope for a more productive method of settling conflicts in many areas of our society, it holds the most promise in a field where Professor Rieke has made invaluable and significant contributions—domestic relations. Mediation has been practiced in dissolution cases to allow the parties control and responsibility over the disposition of their most intimate disputes in a context of greater privacy than afforded in a legal confrontation. Particularly in custody disputes, mediation offers hope that parents will engage in cooperative problem-solving to the ultimate benefit of our entire society.⁷⁰

Our Western focus on individual rights differs greatly from the Chinese view of self as the totality of relationships touching one's life. Nevertheless, we can gain much as a society by identifying those circumstances where preservation of a relationship is more important than achieving a "victory." Educators such as Professor Rieke have made great strides toward this goal by preparing both the heads and hearts of law school graduates to meet this challenge.

70. See, e.g., D. SAPOSNEK, *MEDIATING CHILD CUSTODY DISPUTES* (1983).